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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RED ROCK COMMODITIES, LTD. AND
RED ROCK HOLDINGS, LTD.,
Petitioners,

v.

ABN-AMRO BANK, N.A.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an American corporation, incorporated in Delaware with principal place of business and assets in New York [Red Rock Commodities, Ltd.], which contracts with a New York bank [ABN AMRO, N.A.] in New York that the parties' disputes shall be governed by New York law and may be resolved in either the United States District Court for the Southern District of New York or in the Supreme Court of the State of New York for the County of New York, and which irrevocably submits to jurisdiction in New York for resolution of such disputes, have a claim against the New York bank for evading litigation in New York courts by invoking Israeli court procedure and law to liquidate the American corporation, when the bank knows that the American corporation is not subject to jurisdiction in Israel?

2. Does an American corporation [Red Rock Holdings, Ltd.] incorporated in Delaware with principal place of business and assets in New York, that is not indebted to a New York bank [ABN-AMRO, N.A.], have a claim against the bank for wrongfully liquidating the American corporation in an action commenced in Israel (where there is no personal jurisdiction over the American corporation) based upon the false claim that the American corporation is indebted to the bank?

LIST OF PARTIES

The only parties to this action are listed in the caption. There are no parent companies or subsidiaries of either plaintiff.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit dated August 21, 1996 is reported at 1996 WL 473946 (Appendix A, pp. 1a-3a). The opinion of the United States District Court for the Southern District of New York dated December 5, 1995 is reported at 1995 WL 71439 (Appendix B, pp. 4a-15a).

JURISDICTION

The Court of Appeals order appealed from was entered on August 21, 1996 (Appendix B, pp. 4a-15a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. R. Civ. P. 12(b)(6)

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before a pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party may assert at the trial any defense in law or tact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as

provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 15(a)

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This case involves the wrongful liquidation in Israel of plaintiffs Red Rock Commodities, Ltd. ("Commodities") and Red Rock Holdings, Ltd. ("Holdings"), each Delaware corporations with assets and offices in New York, by the New York arm of a Dutch Bank, defendant ABN-AMRO, N.A. ("ABN").

Commodities and Holdings' Second Amended Complaint (Appendix C, pp. 16a, *et seq.*) alleged claims against ABN arising from ABN's failure to follow the terms of the loan agreements between Commodities and ABN, which provided for New York law to govern the parties' transaction and for litigation of the parties' disputes either in the United States District Court for the Southern District of New York or in the New York State Supreme Court located in New York County.

The loan documents provide that New York law governs the parties' transaction and contain a forum selection

clause at Paragraph XII of the Terms and Conditions agreement (Appendix C, p. 54a). That clause reads in full:

> XII. This agreement shall become effective upon being executed by the undersigned and it and the rights and obligations of the Bank and of the undersigned hereunder shall be governed by and construed in accordance with the laws of the State of New York. Any suit, action or proceeding against the undersigned with respect to this agreement may be brought in the Supreme Court of the State of New York, County of New York or in the United States District Court for the Southern District of New York and the undersigned hereby irrevocably submits to the jurisdiction of such courts for the purposes of any such suit, action or proceeding and consents to the service of process in any such suit, action or proceeding by personal delivery or by the mailing thereof by the Bank by registered or certified mail, return receipt requested, postage prepaid, to the address specified in the records of the Bank, such service of process by mail to be deemed effective on the fifth day following such mailing. The undersigned agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in any manner provided by law.

The District Court improperly construed the parties' loan documents to permit ABN, which had not given Commodities any notice of default, had not made any demand upon Commodities to substitute collateral or to repay the loan (all of which are required by its loan documents), to allege in Israeli receivership and liquidation proceedings that it was entitled to receive repayment of the full amount of its loan from Commodities and Holdings.

The District Court permitted ABN to institute proceedings in Israel, rather than in New York as specified in the loan documents, permitted ABN to litigate its rights against Commodities pursuant to Israel law, rather than

New York law which the loan documents provided was controlling, and permitted ABN's Israeli liquidator (who was ABN's counsel) to sell Commodities' and Holdings' assets worldwide in repayment of its loan.

As a result of the District Court's decision, ABN remains unaccountable for its wrongful institution of liquidation proceedings in Israel against both Commodities and Holdings. ABN is unaccountable for its false claims before the Israeli court that Holdings was indebted to ABN and that the Bank's documentation supported such a debt. Holdings was never indebted to ABN and never guaranteed Commodities' loan from ABN. ABN knew that no such debt existed and that there were no bank documents to support such purported debt. By misleading the Israeli court, in a proceeding where Holdings was not subject to the court's personal jurisdiction, ABN was able under Israeli law to make Holdings responsible for the $10 million loan that ABN made to Commodities and proceeded to have its counsel sell off Holdings' assets in satisfaction of such debt.

All of these decisions were made by the District Court on a motion to dismiss Commodities' and Holdings' complaint for failure to state a claim, without having the benefit of discovery of any kind, where all facts and interences are to be construed in plaintiffs' favor.

REASONS FOR GRANTING THE WRIT

I. THE FOURTEENTH AMENDMENT AND PUBLIC POLICY WARRANT APPLICATION OF NEW YORK LAW TO RESOLUTION OF ABN, COMMODITIES AND HOLDINGS' DISPUTE.

The Fourteenth Amendment guarantees to all litigants the right to procedural due process of law. Procedural due process includes the right of an American corporation to be free from domestic application of foreign judgments or proceedings, when such proceedings are commenced in a foreign court that does not have personal jurisdiction

over the American corporation. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 40 L.Ed. 95, 16 S.CL. 139 (1895); *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); and *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

When an American entity is damaged by another's wrongful application of foreign law to liquidate the American entity, the American entity should be able to obtain redress for this wrongdoing. Here, Commodities and Holdings alleged that ABN made untrue statements to the Israeli courts to encourage them to assert jurisdiction over Commodities and Holdings, and to liquidate those companies' assets in Israel and throughout the world.

The District Court and the Second Circuit did not enforce Commodities' and Holdings' rights against ABN for such wrongful conduct, and instead assumed contrary to the allegations of the complaint that ABN was allowed to choose any forum around the world to litigate its claims with Commodities and Holdings, even a forum without jurisdiction over those entities, and that the foreign court acted properly in liquidating the two corporations.

No analysis was made by the District Court or by the Court of Appeals (and none could have been made since the action was at the pleading stage) to determine whether the Israel court had the requisite minimum contacts with Commodities or with Holdings so as to assert plenary jurisdiction over those entities and liquidate all of their assets. Instead, the lower courts blindly extended comity to the Israeli courts' actions by refusing to find that Commodities or Holdings had asserted a valid claim against ABN for wrongful use of the Israeli court to liquidate the two American companies.

What was evident was that ABN proceeded to litigate its dispute in Israel, rather than in New York, because

Israeli courts are extremely favorable to banks and apply Israeli law, rather than New York law, when liquidating a corporation. Commodities and Holdings believe that it was manifestly unfair that ABN be permitted to do so, without review of its conduct under domestic law.

Israel had no stake in the dispute between ABN and Commodities, because both were American corporations having principal places of business and assets in New York. Furthermore, the loan documents specified that New York law was to be applied, and that Commodities and Holdings irrevocably agreed to submit to jurisdiction in the two New York forums where the parties had a reasonable expectation of litigating any disputes.

When looking at the relationship among the parties—ABN, Commodities and Holdings, the forum—Israel—and the litigation, it is clear that procedural due process was not followed by ABN traveling around the globe to liquidate two American entities in a friendly foreign forum, based upon a purported default of a New York loan agreement. See *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980).

Holdings was especially harmed by ABN's conduct in this regard. As this court noted in *Shaffer* and in *Rush, supra*, at 444 U.S. 328, 100 S.Ct. 577, "[t]he mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action".

American corporations should not be hauled into courts that do not have jurisdiction over them and are located one-half way across the globe, just because the foreign court and foreign law will be favorable to an adversary, and be left without redress, when use of the foreign forum and law is contrary to the American corporation's agreement. Further, if foreign courts, otherwise without juris-

diction over American entities, assume such power, the business affairs of American corporations will be in jeopardy and such wrongful assumption of power will wreak havoc upon our nation's economic and social fabric, not to mention the chaos that will result in our court system. *Cunard Steamship Company Limited v. Salen Reefer Services AB*, 773 F.2d 452 (2d Cir. 1985).

II. THE DISTRICT AND SECOND CIRCUIT COURTS ERRED IN FINDING THAT AS A MATTER OF LAW NEITHER COMMODITIES NOR HOLDINGS COULD ASSERT ANY CLAIM AGAINST ABN FOR ITS BREACH OF THE LOAN DOCUMENTS.

The District Court's dismissal of the Second Amended Complaint amounted to a finding, as a matter of law, that ABN's conduct against Commodities and Holdings, taken at a time when Commodities had fully performed its obligations pursuant to the loan documents, did not constitute a breach of the express or implied terms of the loan documents.

The District and Second Circuit Courts permitted ABN to escape any responsibility for its wrongful use of Israeli law to obtain an order from an Israeli Court resulting in the worldwide liquidation of Holdings, an American entity over which the Israeli Courts had no personal jurisdiction, and one which was not in debt to ABN.

A. Legal Standard for Rule 12(b)(6) Motion.

The District Court noted the appropriate legal standard to follow when deciding a Rule 12(b)(6) motion, that all factual allegations contained in the complaint are presumed to be true and that all reasonable inferences are to be drawn in favor of the non-moving party (citing, at Appendix B, p. 6a, *Paulemon v. Tobin*, 30 F.3d 307, 308 (2d Cir. 1994), *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) and *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991)). The District Court

also properly noted that the complaint should be dismissed only where "the plaintiffs can prove no set of facts in support of [the] claim which would entitle them to relief." (Citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

However, the analysis in the Decision and Order shows that the District Court acted contrary to these rules.

B. The District Court Did Not Accept the Facts Pleaded as True and Drew All Inferences in Favor of ABN.

For example, ABN's precipitous actions in August 1992 could only have been based upon an alleged right to proceed against the collateral that Commodities had pledged as security for ABN's loan. However, since New York law governed the parties' loan transaction, the loan was not due until 1995, no demand for repayment was made, and there was no default under the parties' loan documents, ABN had no right to proceed against the collateral (or Ram, which had taken possession of it) pursuant to New York law. As a result, Commodities had a right to damages for breach of contract and pursuant to § 9-507 of the Uniform Commercial Code.

The District Court ignored the substantive law problems which negated any basis for ABN to proceed against Commodities' collateral, and excused ABN's assertion of improper claims in the Israeli proceedings by finding, at Appendix B, pp. 8a-9a, "ABN was presumably acting in its own interest when it opposed Plaintiff's appointment as liquidator." The District Court permitted such action by presuming, incorrectly, that a default had occurred (see Decision and Order, Appendix B, p. 10a, "upon default . . . "[t]he Bank shall be entitled to the immediate possession of the Collateral" and may "exercise any and all of the rights and remedies provided by . . . the Terms and Conditions . . . .) The complaint repeatedly states that no default had occurred.

The District Court also excused ABN's effort to evade its New York law obligations by assuming and stating that ABN's rights in the Ram, Commodities and Holdings liquidation actions were not controlled by substantive law, but were merely procedural matters not governed by the parties' contractual choice of law provision. "Foreclosure and liquidation actions are inherently procedural and therefore are not governed by the contractual choice of law provision." (Decision and Order, Appendix B, p. 10a).

The District Court's ruling permitted ABN to evade its obligations under the loan documents and New York's Uniform Commercial Code by instituting claims in Israel, which has no jurisdiction over the parties, rather than in New York courts which the parties agreed would be the forum for disputes under the loan documents, and by basing its claims against Ram, Commodities and Holdings upon Israeli law, rather than New York law as the parties had agreed. Each of these actions was a breach of the loan documents, entitling Commodities to recover its losses from ABN.

C. The District Court Erred in Finding That the Agreement Allowed ABN to Litigate Disputes Under the Loan Documents Anywhere in the World.

For ABN to move against Commodities' collateral in advance of any default in its loan, it first had to locate a jurisdiction whose laws were extremely favorable towards banks: in our case, Israel. The District Court condoned this forum shopping and determined that ABN was not precluded from litigating its rights to the collateral in any forum in the world, no matter if jurisdiction existed or not, by finding that the parties' loan agreement contained a permissive, rather than mandatory, choice of forum clause.

In so finding, the District Court made a number of serious errors. First, the District Court misread the forum

selection clause (paragraph XII of the Terms and Conditions, printed above) to expressly permit ABN to commence actions against the borrower "in New York *or elsewhere*" (Emphasis by the District Court, see Decision and Order, Appendix B, p. 10a). Second, the District Court ignored that portion of the forum selection clause in which Commodities agreed that it "irrevocably submits to the jurisdiction of such courts for the purpose of any such suit, action or proceeding" and ignored other portions of the loan documents that made New York law controlling.

The District Court relied upon *John Boutari and Sons, Wines and Spirits, S.A. v. Attiki Importers & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994), which quoted Judge Weinfeld's decision in *City of N.Y. v. Pullman, Inc.*, 477 F. Supp. 438, 442 at n.11 (S.D.N.Y.) (an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion).

Boutari is distinguishable from our case in a number of respects. First, the language of the *Boutari* clause was different from that in our case. In *Boutari*, the jurisdiction clause merely granted substantive jurisdiction to Greek Courts, *which already had jurisdiction over at least one of the parties*, providing "Any dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts."

In our case, however, the forum clause specifically designated either of two courts (the Supreme Court, New York County, and the United States District Court for the Southern District of New York) as the venue in which to prosecute any action with respect to the loan documents; in addition, it contained the agreement to "*irrevocably submit*[*s*] *to the jurisdiction of such courts for the purpose of any such suit, action or proceeding.*" (Emphasis added.) The explicit and irrevocable agreement to

submit to personal jurisdiction of those courts evidences the parties' intent that the forum selection clause was mandatory and not permissive.

The general rule is that contractual forum selection clauses are to be enforced. See *Bense v. Interstate Battery System of America,* 683 F.2d 718, 721 (2d Cir. 1982). The Second Circuit ignored its precedent in our case, and improperly held that a party to a contract that does not contain a mandatory forum selection clause may litigate its contractual disputes with the other contracting parties in a non-enumerated forum, even when such non-enumerated forum does not have personal jurisdiction over any of the contracting parties.

This result is contrary to this Court's holding in *M/S Bremen v. Zapata off-Shore Company,* 407 U.S. 1, at 13-14, 92 S.Ct. 1907, at 1915, 32 L. Ed.2d 513 (1972), and to the holdings in almost every other Circuit that contractual forum selection clauses are *prima facie* valid and should be enforced. See, e.g., *Royal Bed & Spring Co. v. Famoussul Industria,* 906 F.2d 45, 49 (1st Cir. 1990); *Foster v. Chesapeake Ins.,* 933 F.2d 1207, 1219 (3rd Cir. 1991); *Mercury Coal & Coke v. Mannesmann Pipe and Steel,* 696 F.2d 315, 317 (4th Cir. 1982); *Sembawang Shipyard, Ltd. v. Charger, Inc.,* 955 F.2d 983, 986 (5th Cir. 1992); *Moses v. Business Card Exp. Inc.,* 929 F.2d 1131, 1137 (6th Cir. 1991); *Bonny v. Society of Lloyds,* 3 F.3d 156, 159-160 (7th Cir. 1993); *Sun World Lines v. March Shipping Corp.,* 801 F.2d 1066, 1067 (8th Cir. 1986); *Spradlin v. Lear Siegler Management Services,* 926 F.2d 865, 867 (9th Cir. (1991); *Riley v. Kingsley Underwriting Agencies, Ltd.,* 969 F.2d 953, 957 (10th Cir. 1992); *Stewart Organization, Inc. v. Ricoh Corp.,* 810 F.2d 1066, 1068-69 (11th Cir. 1987).

Judge Lasker, in *Cambridge Nutrition A.G. v. Fotheringham,* 840 F. Supp. 299 (S.D.N.Y. 1994), determined that such language supports the construction that such

a forum selection clause is mandatory and enforceable. The clause in that case read:

> This Agreement shall be governed by the laws of the State of New York, U.S.A. All parties hereby submit to the jurisdiction of the courts of the state of New York in regard to any claim, dispute or controversy relating to this Agreement, and all parties agree to accept services of process by mail.

The question before Judge Lasker was whether Fotheringham was bound by the forum selection clause to litigate a dispute under the contract in New York. The Court held that under federal law, the above language is mandatory.

Similarly, in *600 Grant Street Associates Limited Partnership v. Leon-Dielman Investment Partnership*, 681 F. Supp. 1062, 1063-64 (S.D.N.Y. 1988), Judge Sweet found that a choice of law and forum clause containing language virtually identical with that of the parties' loan documents, including "Any suit . . . may be brought in the state courts of, or the federal courts in, New York . . ." and that New York law "governed" the transaction were binding upon the parties.

Contrary to the District Court's erroneous finding that the loan documents explicitly permitted the parties to institute suit in "New York, *or elsewhere*" (Appendix B, p. 10a, emphasis in original), the parties' loan documents do not reserve the right to either party to commence an action in any jurisdiction other than New York or in any court other than in the New York County Supreme Court or the United States District Court for the Southern District of New York. They also do not permit the application of any law other than the law of New York. In these circumstances, it is appropriate to find that actions concerning the parties' agreements be litigated in New York, rather than in any foreign forum, and that New York law governs the parties agreement, rather than foreign law.

Babcock & Wilcox Company, Inc. v. Control Components, Inc., 161 Misc.2d 678, 614 N.Y.S.2d 678 (Sup. Ct. N.Y.Co. 1993) illustrates the mandatory nature of the parties' choice of law and forum selection agreement. In that case the defendant threatened to commence suit in Ohio for alleged breach of contract. The plaintiff commenced a declaratory judgment and injunction action to prevent commencement of the Ohio suit.

The defendant argued, as did ABN here, that the forum selection clause was permissive. In rejecting the defendant [and the ABN's] argument, the Court noted that the parties agreed that their contract "*shall be* governed by New York law", as did the parties in our case; that the parties' agreement provided for consensual submission to the jurisdiction of New York's courts, as does the contract in our case; and that New York's policy, expressed in §§ 5-1401 and 2 of its General Obligations Law is that parties be required to maintain their actions in New York's courts when they provide in their agreements for a choice of New York law and forum to govern their transactions.

Judge Lasker agreed, in *Cambridge Nutrition*, 840 F. Supp. 299, at 302, finding that "New York courts have interpreted the statutory scheme broadly to enforce choice of forum clauses and accept jurisdiction."

The Second Circuit, in *Boutari*, *supra*, at 22 F.3d 53, confirmed "[o]f course if mandatory venue language is employed, the clause will be enforced." We submit that here, the loan agreements both conferred jurisdiction upon and specified venue in the Supreme Court, New York County, and United States District Court for the Southern District of New York, evidencing the parties' intent that the forum selection clause was mandatory and enforceable. For these reasons, the District Court erred in determining that the forum selection clause in the loan documents was permissive as a matter of law.

Boutari is further distinguishable from our case because there, the District Court clearly had jurisdiction over all of the parties. In our case, the Israeli courts did not have plenary jurisdiction over Commodities or Holdings, which are Delaware corporations with principal places of business in New York. ABN had no contact with Israel and absent a voluntary entry into the country was not subject to Israeli court jurisdiction. In these circumstances, it would have been beyond the reasonable contemplation of the parties that any action would be brought in Israel to determine the rights of these American entities with respect to the loan documents. This Court recognized in *Boutari* (also citing Judge Weinfeld at 477 F. Supp. 443), that

> The normal construction of the jurisdiction rules includes a presumption that, *where jurisdiction exists,* it cannot be ousted or waived absent a clear indication of such a purpose (emphasis added).

The converse must also be true. Where jurisdiction does not exist in a particular court, and the parties agree to irrevocably submit to jurisdiction and to venue in a specified court, then their agreement should not be construed to permit institution of actions in locations where jurisdiction is lacking.

When applied to the forum selection clause in our case, the traditional *forum non conveniens* analysis would also warrant selection of the New York forum as agreed to by the parties. *Gulf Oil v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *In re Air Crash v. Pan American World Airways, Inc.,* 821 F.2d 1147, at 1162, 1164 (5th Cir. 1987).

New York was the forum of law governing construction of the contract. New York was the place of execution of the contract. New York was the place where the transaction was to be performed (by payment in American dollars to ABN's New York branch). New York

was the location of both Commodities' and Holdings' principal places of business, the place where ABN's branch office was located and the place where Commodities', Holdings', and ABN's officers who participated in the transaction were located. The evidence of performance was in New York. And ABN's own form contract called for litigation of all disputes in New York.

The New York courts are most familiar with New York law and it serves the interests of justice for American entities to litigate their affairs in their own country and state. See, e.g., *Cambridge Nutrition A.G. v. Fotheringham,* 840 F. Supp. 299, at 302 (1994), citing *Credit Francais v. Sociedad Financiera,* 128 Misc. 2d 564, 490 N.Y.S.2d 670 (Sup.Ct. N.Y.Co. 1985):

> New York, as the center of international trade and finance, has expressly recognized . . . that its courts will be hospitable to the resolution of all substantial contractual disputes in which the parties have agreed beforehand that our neutrality and expertise should govern their relationships.

When ABN sought liquidation of Commodities and Holdings in Israel, it also sought a forum which did not have *in personam* jurisdiction over those parties. Such forum shopping is not permitted by our courts. See, e.g., *In re Air Crash, supra,* at 821 F.2d. 1163 (the doctrine of *forum non conveniens* presupposes the existence of at least two forums in which all defendants are amenable to process). This action, too, was contrary to our expressed public policy that foreign courts have an interest in liquidating or winding up the affairs of their own corporations, *Cunard Steamship Company Limited v. Salen Reefer Services AB,* 773 F.2d 452 (2d Cir. 1985) and the converse, that American courts have a paramount interest in liquidating American corporations.

The District Court's decision in this case would permit any contracting party to litigate a contractual dispute

between American corporations in any forum in the world, regardless of the degree of connection that such forum had to the parties, the business transaction in issue or the governing law, unless the contracting parties provided in their agreement that a selected forum was the exclusive forum for resolution of their dispute.

The decision prevents parties who have agreed to submit to the jurisdiction of New York's courts for determination of their disputes from being certain that such forum would be the arbiter of their disputes. This is contrary to the very purpose of a forum selection clause. See *M/S Bremen v. Zapata Off-Shore Company,* 407 U.S. 1, at 13-14, 92 S.Ct. 1907, at 1915, 32 L. Ed.2d 513 (1972), where the court reasoned:

> Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.

and concluded, at 407 U.S. 15, 92 S.Ct. 1916:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

III. THE COMPLAINT STATES A VALID CLAIM FOR TRESPASS AND CONVERSION.

The complaint states facts sufficient to show that ABN had no relationship with Holdings, yet it commenced liquidation proceedings against it in Israel so that it could recover the proceeds from liquidation of Holdings' assets, and which have and will result in Holdings losing substantial personal and real property.

Holdings has pleaded an unauthorized exercise of ownership over Holdings' assets, based upon misrepresentations to the Israeli courts, which would never be upheld in New York if New York law were applied to the parties dealings, as they agreed it should be. Whether the claim be expressed as one in trespass, conversion or abuse of process, Holdings should have an opportunity to have a trial on the merits of its claim.

ABN tried to defend its conduct by arguing that it was the Israeli court, or the Israeli liquidator (ABN's counsel), that caused Holdings' assets to be sold. This defense is sham, for the Holdings liquidation proceeding would not have occurred at all had ABN not initiated it, prosecuted it, and used its own attorneys as liquidators to deprive Holdings of its assets.

The ABN claim (and District Court excuse) that it was the Israeli liquidator that caused Holdings any damage that it suffered also offers no defense to ABN. If in fact a private party engages in wrongful conduct, the fact that a portion of such conduct may have been engaged in under the authority of a foreign court will not exculpate it from liability. This is especially true since the acts of the foreign officials are not in question here, only the acts of the party who procured such acts through improper conduct. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International,* 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990); *Galu v. Swiss Air Transport Co., Ltd.,* 734 F. Supp. 129 (S.D.N.Y. 1990); *Grupo Protexa, S.A. v. All American Marine Slip,* 20 F.3d 1224 (3rd Cir. 1994).

Here, ABN sought the proceeds of Holdings' assets in an Israeli forum, when it had no right to receive any compensation from Holdings. The District Court should have found that ABN converted Holdings' property under the facts alleged in the complaint. The decision to the contrary below should be reversed.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT PERMITTING AMENDMENT OF THE COMPLAINT.

The District Court abused its discretion in not permitting amendment of the complaint. The motion below was the first time that any complaint in this action was subject to review by the District Court. The Second Amended complaint was a proposed pleading put forward by Commodities' counsel, after deleting one claim inserted by predecessor counsel for breach of fiduciary duty (A. 64-65).

The District Court's citation to *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) implied, incorrectly, that the District Court had permitted counsel to amend the complaint once after a prior motion had been decided pointing out any infirmities. This has not occurred in our case. Accordingly, leave to amend should have been freely granted so this action is resolved on the merits. See 2A *Moore's Federal Practice,* ¶ 12.07[2.-5], at 12-99 (1995).

CONCLUSION

Commodities and Holdings are entitled to a day in Court to obtain redress against ABN for its wrongful liquidation of their assets. For these reasons, I respectfully request that the petition be granted and a writ of certiorari issued by this Court.

Respectfully submitted,

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